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Appellee's Brief 1976-SC-0303

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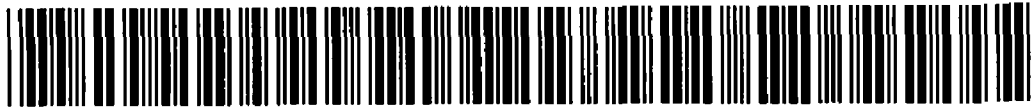
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APPELLEE'S BRIEF

SUPREME COURT OF KENTUCKY

FILE NO. 76-303

WHITE ASH MINING CORPORATION and
JAMES R. YOCOM, COMMISSIONER OF
LABOR AND CUSTODIAN OF THE SPECIAL
FUND.

APPELLANTS

VS:

RAY CASTLE and WORKMEN'S COMPENSATION
BOARD OF KENTUCKY

APPELLEES

APPEAL FROM JOHNSON CIRCUIT COURT
HON. W. B. HAZELRIGG, JUDGE

FILED BRIEF FOR APPELLEE

MAY 4 1976

MARTHA LAYNE COLLINS
CLERK
SUPREME COURT

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RAY CASTLE

This is to certify that a copy of the
within brief has been served on Hon.
John V. Porter, Wells, Porter &
Schmitt, Attorneys at Law, Paintsville,
Kentucky 41240; Hon. William L. Huffman,
Director, Workmen's Compensation Board,
Frankfort, Kentucky and Hon. W. B.
Hazelrigg, Judge, Johnson Circuit Court,
Paintsville, Kentucky pursuant to RAP
1.250, ON THIS the 26 day of
April, 1976.


ATTORNEY FOR APPELLEE

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QUESTION PRESENTED

I. DID THE JOHNSON CIRCUIT COURT ERR IN ITS REVERSAL OF THE DISMISSAL BY THE WORKMEN'S COMPENSATION BOARD OF APPELLEE'S CLAIM BASED ON SILICOSIS WHERE THE EVIDENCE OF THE APPELLANTS' MEDICAL WITNESS, DR. BALLARD WRIGHT, INDICATED APPELLEE DID NOT HAVE PNEUMOCONIOSIS AND HAD NO FUNCTIONAL IMPAIRMENT THEREFROM.

SUPREME COURT OF KENTUCKY

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WHITE ASH MINING CORPORATION and
JAMES R. YOCOM, COMMISSIONER OF
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HON. W. B. HAZELRIGG, JUDGE

BRIEF FOR APPELLEE

RAY CASTLE

MAY IT PLEASE THE COURT:

NATURE OF THE CASE

This appeal is from a judgment of the Johnson Circuit Court entered January 12, 1976, reversing and remanding the denial of Workmen's Compensation Benefits by the Kentucky Workmen's Compensation Board.

STATEMENT OF FACTS

On or about October 9, 1973, the Appellee hereinafter referred to as "Castle" filed an application for adjustment of claim with the Kentucky Workmen's Compensation Board alleging total and permanent disability as a result of silicosis. The Appellants, White Ash Mining Corporation, hereinafter referred to as White Ash and Special Fund were named as defendants. A hearing was held on February 7, 1974 in Paintsville, Kentucky. At the hearing, Castle stated that he had worked 18 years as an underground coal miner. He had worked continuously for his present employer since the 28th day of October, 1968 until

he became disabled on the 20th of September, 1973 as a deep miner. He complained of shortness of breath. On April 29, 1974, the Board sustained Plaintiff's Motion to amend his original application and add the report of Dr. Ronald Chism. Dr. Chism had performed a detailed physical examination of plaintiff at the request of Special Fund and found stage II silicosis.

Subsequent to the hearing, Castle introduced the depositions of several physicians who were of the opinion that plaintiff suffered from pneumoconiosis. Dr. William H. Anderson testified that he had examined a chest x-ray which revealed stage II pneumoconiosis (Deposition of Dr. Anderson, Page 11). Dr. E. E. Musgrave testified that he had performed a physical examination on Castle including x-rays which revealed "early stage II silicosis (Deposition of Dr. Musgrave, Page 5). Dr. C. W. Nelson stated that he had performed a chest x-ray which revealed pneumoconiosis (Deposition of Dr. Nelson, page 5). Dr. Ilona D. Scott testified that she had performed x-rays which revealed pneumoconiosis (Deposition of Dr. Scott, page 4). Dr. Andrew Goodwin testified that he had performed x-rays on the plaintiff which revealed pneumoconiosis l p s (deposition of Dr. Goodwin, page 4).

White Ash introduced the testimony of Dr. Ballard Wright and no other evidence.

On August 26, 1974, the Kentucky Workmen's Compensation Board entered an opinion and order dismissing Castle's claim on the grounds that the plaintiff had failed to sustain the burden of proof and/or persuasion. A Petition for Reconsideration was filed by the plaintiff and overruled by the Board. On September 13, 1974, a Petition for Review was filed in the Johnson Circuit Court by Castle. On January 12, 1976 the Circuit Court reversed the determination of the Board.

ARGUMENT

I. THE JOHNSON CIRCUIT COURT HAS NOT ERRED IN ITS REVERSAL OF THE DISMISSAL OF CASTLE'S CLAIM BASED ON SILICOSIS BY THE KENTUCKY WORKMEN'S COMPENSATION BOARD WHERE APPELLANTS' WITNESS, DR. BALLARD WRIGHT WAS THE ONLY WITNESS TESTIFYING FOR THE APPELLANT.

In its Opinion and Order dated August 26, 1974, the Board, while reciting that the claimant had timely filed his claim for Workmen's Compensation benefits alleging that he had become affected with the occupational disease of pneumoconiosis and/or silicosis on September 20, 1973, nevertheless went on to hold that the claimant had failed to sustain his burden of proof as to his disability.

A careful study of the record in this case reveals that the order of the Workmen's Compensation Board was clearly erroneous upon the basis of reliable, probative, and material evidence contained in the record, and for that reason it should be reversed by this Court. KRS 342.385.

The Appellee before the Board produced the testimony of physicians who had performed complete physical examinations and had determined that the Claimant was suffering from the disabling condition of silicosis, stage II.

Each and every physician who submitted medical information in the case, including the Special Fund's own examining physician, except for one, testified as to the condition of silicosis in the claimant.

The only negative testimony on this point in the whole record was provided by the deposition of Dr. Ballard Wright made on Friday, November 3, 1974, and even Dr. Wright indicated that there were to be found some nodulation in the mid-lung zones of the claimant. (Deposition of Dr. Ballard Wright, page 9), and that this condition extended to both lungs.

Further, Dr. Wright stated that the nodulation which he found in the lungs of the claimant might be determined by other experts of equal training and experience to be pneumoconiosis. (Deposition of Dr. Wright, page 10).

Additionally, Dr. Wright upon cross-examination indicated that the pulmonary function studies that he performed were in his office and under more favorable circumstances than would be confronted by the claimant in pursuing his occupation as an underground coal miner in the presence of equipment and dust in the air.

Dr. Wright's testimony as modified and explained by the cross-examination, constituted the only evidence in the record adverse to the claim of the claimant and was not in and of itself sufficient to overcome the abundant evidence of disability of this man who had worked 18 (eighteen) years in the coal mines. (T. R. P.4).

Thus, the evidence clearly and consistently demonstrates that the claimant was in fact disabled due to his years of exposure to dust, and therefore that the Circuit Court should have and did set aside the judgment of the Workmen's Compensation Board, and rule that the miner's disability is compensable as a matter of law since the testimony of Dr. Wright, when tested upon cross-examination, was insufficient to overcome the affirmative evidence in the record that the claimant was entitled to an award. Cabe vs. Bush, 424 SW 2d 585, (1968); Young vs. Eastern Coal Corporation, 408 SW 2d 464, (1966).

When viewed as a whole, the evidence demonstrating the claimant's disability is so persuasive as to require a finding in his favor. Young vs. Burgett, 383 SW 2d 450, (1972).

It is submitted, as contended, in the claimant's original brief in this action before the lower Court, that when viewed as a whole the evidence demonstrating the claimant's disability is no persuasive as to require a finding in his favor. A review of the record will demonstrate that this alone requires a finding for the claimant.

However, perhaps the most significant aspect of the instant case is that the claimant was entitled to a judgment of the lower Court reversing the decision of the Workmen's Compensation Board, because of that Board's erroneous failure to render an award in conformity with the provisions of KRS 342.004, in that the Board failed to give effect to the presumption required by that provision.

KRS 342.004 requires as follows:

"This chapter shall be liberally construed on questions of law, as distinguished from evidence, and the rule of law requiring strict construction of all statutes in derogation of the common law shall not apply to this chapter. In any proceeding

for the enforcement of a claim for compensation under the law for pneumoconiosis or silicosis it is presumed, in the absence of substantial evidence to the contrary, that the claim comes within the provisions of the law." (Emphasis added)

The clear mandate of the law therefore is that upon a claim for pneumoconiosis or silicosis, the Board indulged the presumption that the miner's claim comes within the law and thus that he is disabled by silicosis or pneumoconiosis to an extent sufficient to impair his earning capacity. Given this proposition, the result reached by the Workmen's Compensation Board in this case, that "the plaintiff has failed to sustain his burden of proof and/or persuasion to the effect that he is affected with the occupational disease of silicosis and/or is disabled thereby", expressed in the Order of the Board dated August 26, 1974, is erroneous under the law and must be reversed.

In effect, the claimant in a pneumoconiosis or silicosis case has no initial burden of proof and/or persuasion since, under the above-quoted and italicized passage from KRS 342.004, the mere filing of a claim for pneumoconiosis or silicosis shifts the burden of going forward with the evidence, and of producing substantial evidence to the contrary, to the Defendant. (KRS 342.004)

Generally speaking, the terms "burden of proof", "burden of persuasion", "burden of going forward with the evidence", have had so many different definitions connected with them by Court in various jurisdictions in this country, that their use in any attempt at accuracy is fraught with peril. Fortunately, however, the force and effect of these concepts, at least insofar as they are applicable to Workmen's Compensation cases, were explained in the opinion by Judge Palmore in the case of Workman vs. Wesley Manor Methodist Home, 462 SW 2d 898 (1971). There, it was held that although the evidence produced by a defendant in a Workmen's Compensation case may be insufficient to constitute "substantial evidence", and thus insufficient to support a finding

that the plaintiff is not disabled as a result of a work-related injury or disease, even "insubstantial" evidence may be sufficient to cast doubt upon the presumption raised after the claimant's testimony that his injury or disease rose out of his work and that he is disabled thereby. In such a case, held the Court, the Board was free either to find or to decline to find in favor of the plaintiff on his claim for compensation, referring to a situation in which the Board would decline to find for the plaintiff as "a negative finding to the simple effect that the claimant had not satisfied the burden of " proof. Basically, such a finding is exactly what the Board made in this case in its Order of August 24, 1974. It determined simply that because of some evidence in opposition to the claim, which the Board did not determine was substantial,"the plaintiff has failed to sustain his burden of proof and/or persuasion to the effect that he is affected with the occupational diseases of silicosis and/or is disabled thereby". (Opinion of the Board, page 1)

The trouble with the Board's determination quoted above, and the reason that it was erroneous as a matter of law and must be reversed by the lower Court, is that, subsequent to the Court's decision in the Workman case, the 1972 Kentucky General Assembly enacted an amendment to KRS 342.004, quoted above, which establishes the statutory presumption that a silicosis or pneumoconiosis comes within the law, and requires substantial evidence to overcome this presumption. Thus, since the 1972 amendment to the law, which was in effect at the time of the claimant's alleged disease onset and the filing of his claim, it is no longer possible under the law, as it might have been previously, for the Board in a silicosis claim to find simply that a claimant had failed to sustain his burden of proof and/or persuasion that he was afflicted with silicosis, as the Board has erroneously attempted to do in this case.

Our system of government is one in which neither Judge's nor Workmen's Compensation Board members are free to ignore any of the passages of the Workmen's Compensation law. Neither are they

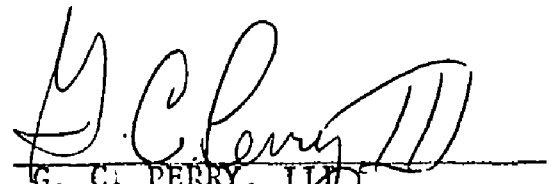
at liberty to substitute their judgment for that of the legislature in determining what the law should be instead of what it is. Members of the Board or of the various courts of this Commonwealth may disagree with the reasoning behind, or necessity for, the second sentence of KRS 342.004, but, so long as they do not deem it unconstitutional, they are bound to follow and apply its provisions and are powerless to render determinations of the kind made by the Board, as quoted above in the instant case.

Since the Board's order is not in conformity with the provisions of KRS 342.004, the Circuit Court should have reversed the order of the Board dated August 24, 1974 and remand this case to the Workmen's Compensation Board with directions to enter an Order in conformity with the law and an award of full benefits to Ray Castle, which it did.

CONCLUSION

For the foregoing reasons, the Appellee respectfully requests the Court to reverse the Order of the Board by sustaining the Circuit Court.

Respectfully submitted,


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